

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	CG Docket No. 02-278
)	
Rules and Regulations Implementing)	
)	
the Telephone Consumer Protection)	
)	
Act of 1991)	

**OPPOSITION TO THE PETITION
OF THE DIRECT MARKETING ASSOCIATION**

I respectfully submit this Opposition to the Petition filed with the Commission by the Direct Marketing Association (“DMA”) in regard to the Commission’s Report and Order adopted June 26th, 2003. [In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, FCC Rcd., 03-153 (F.C.C. Jul 03, 2003), 68 FR 44144-01.]

In the DMA Petition for Reconsideration, the DMA has asked the Commission to reconsider some of the conclusions the Commission reached in the Commission’s Report & Order. I address in my Opposition to the Petition several requests by the DMA to create so-called “safe harbors” to insulate the telemarketing industry from TCPA liability that in reality are exemptions which the TCPA does not contain.

Telemarketing Calls to Businesses

The DMA, in its petition, asks the Commission to “provide clearer delineation between calls to businesses and calls to residential subscribers” and adopt the FTC’s explanation that “calls to home businesses would not be subject to the amended Rule’s ‘do- not-call’ requirements.”

The DMA is trying to backdoor a loophole into the TCPA with its request! Telemarketers could use the classifications from list brokers as to the classification of a residence telephone number being a business or home telephone number. The classification of “residential telephone line” does not turn on the telemarketer’s or list broker’s classification:

Regarding the Issue of the Plaintiff operating a business, this Court had the opportunity to visit this question on two other occasions with the Plaintiff. In each case, the evidence showed that the telephone company had the number in question, (216) 447-9249, listed and billed as a private residence. Moreover, the Court strongly suggested to the Defendant's representative in those cases that their records be changed to more accurately reflect the situation, and not rely

upon a clearinghouse like Dun & Bradstreet. This obviously was not done, despite assurances it would.

However, Defendant's contention that the Plaintiff offered "no proof" that his telephone number is used for residential purposes is clearly without merit. Dun & Bradstreet, upon which Defendant bases its claim, is essentially a service which compiles business data. It does not guarantee that it is totally reliable. More importantly, the Plaintiff introduced his telephone bills, which incidentally came from the telephone provider, which clearly state and bill the Plaintiff as a residential customer. Certainly such evidence is more compelling than Dun & Bradstreet.

Adamo v. AT&T No. 00 CVI 1856 (Ohio Mun. Nov. 7, 2000) aff'd 2001 WL 1382757 (Ohio App. Nov. 8, 2001)

It is inconsistent with the privacy protections of the TCPA for the telemarketing industry to create its own definitions of what is and what is not a residential telephone line. If the example of the farmer establishes that a residence is a business then it is not that far-fetched that the telemarketing industry will claim that a hobbyist working out of their residence would also be considered a business. Furthermore, as the DMA describes it, an employee calling his or her employer would have given up their right to privacy in their residence as they have made a business call.

The question of whether or not a telephone line is a residential telephone line must turn on the telephone bill and not a telemarketer's or list broker's classification to ensure the privacy protections set forth in the TCPA.

Telemarketing Calls to Wireless Telephone Numbers

The DMA, in its petition, requests that the Commission create a "safe harbor" for telemarketing calls to wireless numbers. The DMA also admits that current technology provides for a "highly accurate" identification of wireless numbers. That being the case there is certainly no need to insulate telemarketers from liability for TCPA violations in regards to wireless numbers. As the Commission noted telemarketing, including short text messages, to wireless numbers shifts the cost of the advertisement to the recipient.

The DMA also requests that wireless numbers be separated from the no-call list. The DMA claims that including wireless numbers on the no-call list is unnecessary and burdensome to telemarketers. The inclusion of wireless numbers on the no-call list is neither unnecessary nor burdensome. It is absolutely necessary given number portability where the consumer can keep the same number for a lifetime and use their wireless number as a residential telephone line. The Commission has wisely extended all of the protections of the TCPA to wireless numbers. Consequently, the DMA's request is without merit.

The DMA, in its petition, asks the Commission to reconsider the use of “telemarketing call” in the recorded message initiated when a call is abandoned. Additionally, the DMA suggests an example of an abandoned call prerecorded message:

“Hi, this is Company A, Inc. calling today to sell you our services. Our number is 555-555-1212. We will try you again later.”

Such an example is by definition a telemarketing call. A proper example would be:

“This is A, Inc. Our number is 555-555-1212. This is an abandoned telemarketing call.”

The DMA’s example contains an advertisement for services. The second does not¹ and provides the recipient of the call with meaningful information why a prerecorded message was initiated by the caller. The Commission may want to reconsider the impact of the abandoned call prerecorded message requirement – Fax.com/Inbound Calls Inc. will use this requirement to claim its prerecorded telephone messages are legal and authorized by the Commission.

Caller Identification (caller ID)

The DMA goes further and suggests that caller ID already provides identification and it would be duplicative to provide that information in the recorded message. Only 40% of telephone line subscribers use caller ID services. It is ludicrous for the DMA to suggest that the other 60% are not entitled to the proper identification of the caller as required by the TCPA! The DMA is also forgetting the many hang-ups made by telemarketers when the called party asks for identification of the caller and inclusion on a company specific no-call list. In such cases swift resolution of TCPA violations depends on identification of the caller which caller ID can and does provide.

Are there issues in transmitting or receiving caller ID information? Caller ID capability has always been available to the telemarketing industry. They choose not to transmit caller ID information in order to hide who was initiating the call. Again, swift resolution of TCPA violations depends on identification of the caller which caller ID can and does provide.

Prerecorded Telemarketing Calls to Answering Machines or Voice Mail

The DMA, in its petition, states “The DMA would also support a narrow exception to the prerecorded message solicitations where the message is only left on an answering machine.” The DMA is nefariously attempting to create an exemption which is not in the statute. The TCPA specifically regulates “initiation” of prerecorded telephone

¹ The name of a business in a prerecorded telephone message may be considered by the courts as an advertisement and would then constitute a violation of the TCPA.

solicitations². The Commission noted in its Report & Order “The record reveals that consumers feel powerless to stop prerecorded messages largely because they are **often delivered to answering machines...**” The Commission properly clarified the TCPA regulation of such calls in footnote 544 of the Report & Order “Delivery of a message to an answering machine does not render the call lawful.”

What happens after a prerecorded telephone solicitation is initiated is irrelevant when it comes to compliance with the TCPA. It is a settled matter that prerecorded telephone solicitations received by an answering machine or a voice mail service are a violation of the TCPA. The Commission has cited ten (10) entities for prerecorded telephone solicitations that were received by an answering machine or voice mail (the quotes are from the original complaint - copies of which were obtained by Freedom of Information Act):

1. FCC Citation EB-02-TC-065 - Direct Data USA (“...call was recorded in my **voice mail...**”)
2. FCC Citation EB-02-TC-048 - Vital Living Products (“...had a prerecorded message left on his **answering machine...**”)
3. FCC Citation EB-03-TC-005 - Lifetime Capital Guarantee (“...I received a call to my cell that was a pre-recorded message... As the telephone was not on at the time the message was recorded by my Sprint PCS service.”)
4. FCC Citation EB-03-TC-009 - Spry Group (“I received a pre-recorded call yesterday on my **answering machine...**”)
5. FCC Citation EB-03-TC-015 - National Cleaning Service (“Recorded message left on **answering machine...**”)
6. FCC Citation EB-03-TC-021 - Bridge Capital Corporation (“...an automatic recording was left. The message on our **answering machine...**”)
7. FCC Citation EB-03-TC-051 - T & T Carpet & Upholstery Cleaning (“... an unsolicited, commercial, prerecorded telephone message was left on my **answering machine...**”)
8. FCC Citation EB-03-TC-036 - Warrior Custom Golf Inc. (“I have received three unsolicited, automated, prerecorded messages on my **voice mail...**”)
9. FCC Citation EB-03-TC-058 - AV Marketing Inc. (“...a recorded message...on my home **voice mail...**”)
10. FCC Citation EB-03-TC-064 - Dish America Inc. (“...unsolicited telemarketing recordings left on my **answering machine...**”)

² The statute in question says it is unlawful to initiate such calls without the prior express permission of the called party. This clearly means the permission must be granted prior to the initiation of the call. **It does not matter what happens after the call is made or how it is received** regarding the issue of permission. Ryan P. Agostinelli v. LM Communications of South Carolina et al, No. 00-SC-86-2862, In the Small Claims Court, County Of Charleston, South Carolina

Clearly, there is no exemption in the TCPA on the initiation of prerecorded telephone solicitations to residential telephone lines that are received by an answering machine or voice mail.

I oppose the DMA's Petition for Reconsideration on the issues I have addressed. Consequently, I respectfully request that the Commission deny the DMA's request for any modifications to its Report & order on the issues of telemarketing calls to businesses, telemarketing calls to wireless numbers, caller identification (caller ID) and prerecorded telephone solicitations to answering machines or voice mail.

Respectfully submitted,

/s/

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Certificate of Service:

I hereby affirm and state that a true and accurate copy of this Opposition to the Petition of the Direct Marketing Association was mailed via first class mail, with sufficient postage paid, to the Petitioner:

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